OCT 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

IN REPLY TO RESPONDENT'S BRIEF

ROBERT W. WARREN
Attorney General of Wisconsin

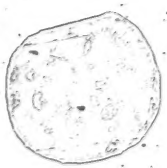
ROBERT D. MARTINSON
Assistant Attorney General

CHARLES A. BLECK
Assistant Attorney General

Attorneys for Petitioners

Post Office Address:

114 East, State Capitol
Madison, Wisconsin 53702



INDEX AND SYNOPSIS OF ARGUMENT

Page

I. The Issue Is Not Accurately Stated In Respondent's Brief 1

II. Respondent's Argument Concerning The Conflict Between The Circuits Is Unclear And Inaccurate 2

CASES CITED

Drown v. Portsmouth School District,
435 F. 2d 1182 (1st Cir. 1970), Cert. denied,
39 U.S.L.W. 3511 (May 17, 1971) 4

Freeman v. Gould Sp. School Dist.,
405 F. 2d 1153 (8th Cir. 1969), Cert. denied,
396 U.S. 843 (1969) 4

Gouge v. Joint School District,
310 F. Supp. 984 (W.D. Wis. 1970) 2

Jones v. Hopper,
410 F. 2d 1323 (10th Cir. 1969),
Cert. denied, 397 U.S. 991 (1969) 4

Myrsiades v. Towne,
(W.D. Wis., decided Oct. 4, 1971) No. 70-C-52 2

Orr v. Trinter,
No. 20721 (6th Cir. June 16, 1971) 4

Parker v. Board of Education of Prince
George's County, Md., 237 F. Supp. 222
(D. Md. 1965), aff'd per Curiam, 348 F. 2d 464
(4th Cir. 1965), Cert. den., 382 U.S. 1030 (1966) 4

Page

Shirck v. Thomas,
et al. (7th Cir. 1971, decided Sept. 2, 1971),
No. 18790 1,3

Sindermann v. Perry,
430 F. 2d 939 (5th Cir. 1970),
Cert. granted No. 70-36 4

STATUTES INVOLVED

Wisconsin Statutes

Sec. 16.22 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,
Petitioners,

v.

DAVID F. ROTH, for himself and for all others similarly situated,
Respondent.

IN REPLY TO RESPONDENT'S BRIEF

I. The Issue Is Not Accurately Stated In Respondent's Brief

We have always considered the decision in *Roth* to require a statement of reasons and hearing whenever demanded by the public probationary employe regardless of whether the employe coupled that demand with the claim that nonrenewal was based on constitutionally protected activity. It is clear from Respondent's footnote on page 9 of his brief that this is the correct reading of *Roth*. The footnote refers to *Shirck v. Thomas, et al.* (7th Cir. 1971, decided September 2, 1971,

No. 18790). This case, relying on *Roth*, clearly holds that a probationary teacher is entitled to a statement of reasons and hearing whenever demanded and regardless of any claim that nonrenewal was based on constitutional activity.

Accordingly, Respondent's framing of the issue is incorrect.

Nor can there by any doubt as to whether the *Roth* decision applies to all public probationary employment. The Court relying on *Roth* and on *Gouge v. Joint School District*, 310 F. Supp. 984 (W.D. Wis. 1970), in *Myrsiades v. Towne*, (W.D. Wis., decided October 4, 1971, No. 70-C-52), denied the employer's motion to dismiss the complaint, holding:

> "I now conclude and hold that in some measure, a vocational rehabilitation counselor employed by a state government on a probationary basis is entitled to procedural protections with respect to a decision to terminate his employment.
>
> "The procedural constitutional guarantees available to one in plaintiff's position — a probationary state employee on the job for only about four months — should be minimal."/1

II. Respondent's Argument Concerning The Conflict Between The Circuits Is Unclear And Inaccurate

Respondent in framing his question as well as in his attempt to distinguish the *Roth* decision from the decisions of other circuits employs a strained interpretation of *Roth*.

/1 *State law provides for a six month probationary period, sec. 16.22, Wis. Stats.*

Respondent apparently takes the position that *Roth* is limited to those situations where there exists between the employer and the employe a First Amendment controversy. This argument appears to be based on the quoted language found on pages 8 and 9 of his brief. However, if one considers the entire sentence of which the quoted language was but a part, no such limited application or destination can be made. The entire sentence reads:

> "Although the principle announced by the district court applies by its terms to all non-retention decisions, an additional reason for sustaining application in the instant case, and others with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights." (app. 206)

Certainly the Seventh Circuit realized that no such limited application was intended in *Roth* when it decided the *Schirck* case. Just as certainly, Respondent realizes (and perhaps even concedes in his footnote) that with the decision of the Court in the *Schirck* case no valid distinction can be drawn between *Roth* and the decisions of the First and Sixth Circuits. The Seventh Circuit did not take a different position in *Schirck* but relied on *Roth*. *Roth* is as much in conflict with the decisions of the First and Sixth Circuits as Respondent admits the *Schirck* case to be. The dissenting opinion in *Roth* (App. 207-216) as well as Respondent's own brief shows the real and extensive conflict between the decision in

Roth and the decisions of the First, Fifth, Sixth, Eighth and Tenth Circuits.[2]

We have been advised that a petition for certiorari has been filed (August 18, 1971) in *Orr v. Trinter*. It is respectfully requested, that should the petition in that case be granted as well as in this case, that these matters be consolidated with the pending case of *Sindermann v. Perry*.

It is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General

CHARLES A. BLECK
Assistant Attorney General

Attorneys for Petitioner

---

[2] *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1st Cir. 1970), Cert. denied, 39 U.S.L.W. 3511 (May 17, 1971)
Sindermann v. Perry, 430 F. 2d 939 (5th Cir. 1970), Cert. granted No. 70-36
Orr v. Trinter, No. 20721 (6th Cir. June 16, 1971)
Freeman v. Gould Sp. School Dist., 405 F. 2d 1153 (8th Cir. 1969), Cert. denied, 396 U.S. 843 (1969)
Jones v. Hopper, 410 F. 2d 1323 (10th Cir. 1969), Cert. denied, 397 U.S. 991 (1969)

There is also conflict between the Seventh and Fourth Circuits, see *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md. 1965), aff'd per Curiam, 348 F. 2d 464 (4th Cir. 1965); Cert. den., 382 U.S. 1030 (1966)